STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JAMES EARL COLLINS, JR., Defendant-Appellant.	UNPUBLISHED May 26, 2009 No. 285304 Wayne Circuit Court LC No. 07-015194-FC

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Defendant pleaded guilty to two counts of criminal sexual conduct in the first degree, MCL 750.520b(1)(a), and was sentenced to serve concurrent prison terms of 225 months to 450 months. Defendant appeals by delayed leave granted, challenging the scoring of one of the offense variables under the sentencing guidelines. We affirm.

In the course of offering his plea, defendant admitted that between September and December of 2006, at his mother's house, he had oral and anal sex with a girl he described as his ten-year-old "cousin." Despite defendant's characterization, apparently the victim was not a blood relative.

The presentence investigation report (PSIR) stated that defendant awakened the girl, forced her into the basement, and threatened to kill her entire family if she did not do as he demanded. The report continues that defendant then penetrated the girl anally, then orally, and that the victim described "yellow stuff" coming out of defendant's penis and into her mouth. The child thereafter required treatment for syphilis.

For purposes of calculating defendant's minimum sentence under the guidelines, the trial court scored Offense Variable (OV) 7, which addresses aggravated physical abuse, at 50 points. Defense counsel's objection was noted for the record. Fifty points are prescribed where the offender treated the victim "with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense . . . ." MCL 777.37(1)(a). Subsection (3) of that statute in turn defines "sadism" as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification."

"This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). To the extent that a scoring issue calls for statutory interpretation, review is de novo. *Id.*

At sentencing, when defense counsel proposed a score of zero for OV 7, the prosecuting attorney stated that, "there's no indication that [the victim] was tortured or subjected to sadism," but noted that indications were that defendant had threatened her life if she spoke of the crimes. The trial court stated, "I'll agree with the prosecutor that OV 7 should be scored 50 points for the reason that at the act of penetration was accompanied with the threat to kill in order to insure the silence of the victim."

Review of the sentencing transcript brings to light that the prosecuting attorney did not in fact expressly propose a score of 50 points for that variable. However, neither the prosecuting attorney's hedging, nor the trial court's slight misapprehension on the matter, deprived the court of its prerogative to score the variable according to its judgment.

We agree with defendant that there is no indication that defendant issued his death threats for purposes of his gratification, and thus did not introduce an element of sadism. However, sadism is but one avenue for a score of 50 points; "excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense" is another. MCL 777.37(1)(a). We disagree with defendant's argument that those death threats should be deemed to have been issued after the sex acts were completed, and thus that those threats did not operate to increase fear or anxiety "during the offense."

The agent's description of the offense in the PSIR presents the death threats before the sex acts. This implies that that the threats came first so as to guarantee heightened fear and anxiety in the child-victim during the physical abuse itself. But even if the threats came afterward, there is no suggestion that they came so long afterward that they were not inherently bound up with the victim's experience of criminal sexual aggression at defendant's hands. Because the threats to kill the victim's family may reasonably be deemed as constituting "excessive brutality or conduct designed to substantially increase the fear and anxiety [the] victim suffered during the offense," MCL 777.37(1)(a), we affirm the trial court's decision to assess 50 points for OV 7.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Douglas B. Shapiro